

<p style="text-align: center;"><b>CHAPTER VII</b> <b>PROCEDURAL SAFEGUARDS AND STATE COMPLAINT PROCEDURES</b> <b>707 KAR 1:340</b></p>
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## **SECTION 1. NOTICE - PARENT PARTICIPATION IN MEETINGS**

### **Written Notice of ARC Meetings**

A parent of a child with a disability shall be afforded an opportunity to participate in all meetings concerning his child. The LEA shall provide parents a written notice of ARC meetings in accordance with this administrative regulation. (See also Chapter V, Section 4.)

The KLEA Representative takes steps to make sure that one or both of the parents of the child are present at each meeting or are afforded the opportunity to participate, including:

- a. notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
- b. scheduling the meeting at a mutually agreed upon time, date, location and place.

Each written notice, which is sent by the KLEA Representative or designee, is sent **seven (7) calendar** days prior to the scheduled meeting (e.g., dated and sent on Monday for a scheduled meeting the following Monday.) A copy of each written notice is maintained in the educational record of the child.

### **Inspection and Review of Records**

A parent of a child with a disability shall be afforded an opportunity to inspect and review all records with respect to identification, evaluation and educational placement of the child and the provision of FAPE to the child. {In accordance with Family Education Rights and Privacy Act requirements and KRS 160.700 - 160.730.}

The KLEA permits parents to review and inspect any educational records related to the identification, evaluation, and placement of their child, or the provision of a free appropriate public education to the child which are collected, maintained, or used by the district. The same access rights apply to the eligible student (age 18 or older).

The KLEA allows either parent (including natural or adoptive parent, guardian or an individual acting as a parent) access to the educational records of a child unless the district is presented with written evidence of a court order relating to such matters as divorce, separation, or custody. This document must specifically revoke parental rights regarding access to records in order for the KLEA to deny a parent access to his/her child's educational records.

See Chapter IX, Confidentiality of Information, for more specific procedures.

### **Conversations Without Parent Present**

LEA staff shall not be prohibited, by special education regulations, from having informal, scheduled or unscheduled conversations that may include:

- (a) teaching methodology if those issues are not addressed in the child's IEP;
- (b) lesson plans if those issues are not addressed in the child's IEP;
- (c) coordination of service provision if those issues are not addressed in the child's IEP; or
- (d) preparatory activities to develop a proposal or response to a parent proposal that will be discussed at a later ARC meeting.

Discussions between teachers and administrators, which may or may not be pre-arranged, are not meetings for which parents must receive notice and the opportunity to attend.

## **SECTION 2. INDEPENDENT EDUCATIONAL EVALUATION**

### **Parental Right to an Independent Educational Evaluation**

A Parent of a child with a disability shall have a right to obtain an independent educational evaluation of the child. Upon receiving the request, the LEA shall provide information to the parent about where an independent educational evaluation may be obtained and the LEA's applicable criteria for independent educational evaluations.

The **KLEA Representative** is responsible for giving the parent information relative to obtaining an independent educational evaluation and the KLEA criteria for such evaluations, in accordance with Chapter III, Section 3 (Evaluation and Reevaluation) of these Procedures.

The parent's request for an independent educational evaluation is subject to the parent's disagreement with a complete evaluation that the LEA has been given the opportunity to conduct on the child.

The LEA may ask for the parent's reasons why he objects to the LEA's evaluation; however the parent shall not be required to respond and the LEA shall not deny its action while waiting for a response from the parent.

Upon receiving the request, the LEA shall, without unnecessary delay,

- (a) initiate a due process hearing to show that its evaluation is appropriate;
- (b) ensure that an independent evaluation is provided at public expense; or
- (c) demonstrate in a due process hearing that the evaluation obtained by the parent did not meet LEA criteria. If the final decision of the hearing officer is that the LEA's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

**Public Expense (KLEA)**

Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria the LEA uses when it initiates an evaluation. {Chapter III, Section 3} Aside from these criteria, the LEA shall not impose any other conditions or timelines relating to obtaining an independent educational evaluation at public expense. If a due process hearing officer, as part of a hearing, requests an independent educational evaluation, the cost of that evaluation shall be at public expense.

**Private Expense (Parent)**

If the parent obtains an independent educational evaluation at private expense and it meets the agency criteria, results of the evaluation shall be considered by the LEA in any decision made with respect to the provision of a free appropriate public education (FAPE) to the child.

**SECTION 3. NOTICE OF PROCEDURAL SAFEGUARDS.**

**Written Notice of Proposed or Refused Action**

The LEA shall provide a written notice to the parents of a child with a disability a reasonable time before the LEA:

- (a) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (b) refuses to initiate or change the identification, evaluation, or educational placement or the provision of FAPE to the child.

Parents receive a notice of the proposed or refused action regardless of whether they attend the ARC meeting. This notice may be accomplished by mailing the Conference Summary form, including minutes of the meeting where the action was determined, with a copy of a proposed IEP, if applicable, to the parents who did not attend the meeting within **two (2) school days** of the date the meeting was held. If the parent attended the meeting, copies of these documents may be given to the parent at the close of the meeting. In this case, if the parent agrees, the action as described may be implemented immediately. If the parent was not present at the meeting, the parent has five (5) school days from the date on this notice to respond to the KLEA concerning the proposed or refused action. If no response is received, the KLEA will initiate the action as described in the notice. The Conference Summary form is in a format provided by the district and includes all necessary components for a notice of proposed refused action as follows.

Each written notice of a proposed or refused action includes:

- (a) a description of the action proposed or refused by the LEA;
- (b) an explanation of why the LEA proposes or refuses to take the action;
- (c) a description of any other options the LEA considered and the reasons why those options were rejected;
- (d) a description of each evaluation procedure, test, record, or report the LEA used as a basis for the proposed or refused action; and
- (e) a description of any other factors that are relevant to the LEA's proposal or refusal;
- (f) a statement that the parents of a child with a disability have protection under the procedural safeguards in 707 KAR Chapter 1 and 34 CFR Section 300.504 and if this notice is not an initial referral for evaluation, the means by which a copy of the procedural safeguards can be obtained; and
- (g) sources for the parent to contact to obtain assistance in understanding the provision of this section.

The notice shall be written in language understandable to the general public and provided in the native language or other mode of communication of the parent unless it is clearly not feasible to do so. If the native language of the parent is not a written language, the LEA shall take steps to ensure that the notice is translated orally or by other means so that the parent understands the content of the notice and that there is written evidence of this translation.

The KLEA Representative makes sure written notices are understandable to the general public. This written notice is through a form provided by the KLEA for this purpose.

The KLEA Representative determines the language or mode of communication used by the parent of the child and provides notice in that language or mode of communication unless it is clearly not feasible to do so. The native language of the parent of a child is the primary language used in the home, i.e., the language most frequently used for communication by the parent of the child. If the native language or mode of communication is not English, the KLEA Representative informs the DoSE of the need for a translation or interpretation of the notice. The DoSE makes sure:

- a. that the notice is translated orally or by other means to the parent in his native language or other mode of communication; and
- b. that there is written evidence that these requirements have been met.

The DoSE obtains the necessary translation or interpretation of a notice. Copies of all letters of correspondence involved in securing the necessary interpretation or translation of a notice, and a copy of the translation, are maintained in the office of the DoSE.

### **Written Notice of Parent's Rights**

A copy of the procedural safeguards (e.g. Parent's Rights) shall be given to the parents of a child with a disability:

- (a) upon initial referral for evaluation;
- (b) upon invitation of each ARC meeting;
- (c) upon reevaluation of the child; and
- (d) upon receipt of a request for a due process hearing.

This procedural safeguards notice (Parent's Rights) shall include a full explanation of all the procedural safeguards available under 707 KAR Chapter 1 and 34 CFR Section 300.504.

This Parent's Rights document shall be in a format provided by the KLEA. A copy shall be mailed to the parent with the Notice of Admissions and Release Committee Meeting for the initial ARC meeting for referral or transfer students, so the parent may have an opportunity to gain information about the process and their rights before attending the meeting.

For all subsequent ARC meetings, the Notice of Admissions and Release Committee Meeting informs the parent that they may request another copy or explanation of the parent's rights prior to the meeting. (Note: This requires a change in the Notice of Admissions and Release Committee Meeting form.)

#### **SECTION 4. PARENTAL CONSENT**

See Chapter I, Definitions for a definition of "consent".

The LEA shall obtain informed parental consent before conducting an initial evaluation or reevaluation and before the initial provision of specially designed instruction and related services.

The special education teacher files a copy of each written consent statement in the due process folder of the child.

The KLEA Representative makes sure that the parent of the child gives informed consent voluntarily by:

- a. providing the parent of the child with information that is correct and complete; and
- b. giving the parent of the child time to consider the request for consent.

Consent is not required for the following actions:

- \* Review existing data as part of an initial evaluation or a reevaluation, or
- \* Administer a test or other evaluation that is administered to all children unless consent is required of parents of all children. 34 CFR 300.505(a)(3)

Any screening or assessment that is not administered to all same-aged peers in the general population requires informed, written parental consent.

#### **Consent for Initial Evaluation**

The KLEA Representative obtains written parental consent before any procedures are used selectively with an individual child to determine if the child has a disability and needs specially designed instruction and related services.

The consent statement includes a place for the date and the parent's signature.

The consent for initial evaluation shall be obtained on a form provided by the KLEA, and includes a description of the types of individual evaluation tests and procedures that will



be used selectively with the child in all areas related to the suspected disability. Areas related to the suspected disability may include, for example: health, vision and hearing, motor abilities, social and emotional, general intelligence, academic performance, and communication status.

The written consent states that the parent understands and agrees:

- a. to a full and individual evaluation of the child in all areas related to the suspected disability by the multidisciplinary team; and
- b. consent is given voluntarily.

The request for consent to evaluate should be accompanied by the Conference Summary Action Notice.

### **Consent for Provision of Specially Designed Instruction and Related Services**

The KLEA representative obtains written informed parental consent prior to the time a child receives specially designed instruction and related services. The consent statement explains that specially designed instruction and related services will be provided as described in an IEP and in the placement(s) specified by the ARC in the conference summary.

The consent statement includes a place for the date and the parent's signature and states that the parent understands and agrees:

- a. to the provision of specially designed instruction and related services in the least restrictive environment; and
- b. consent is given voluntarily.

The request for consent to serve (provide specially designed instruction and related services) is accompanied by the notice of the ARC proposed action that the child is determined educationally disabled and eligible to receive specially designed instruction and related services.

Once the parent gives consent for a child with disabilities to receive specially designed instruction and related services, the KLEA does not require any additional consent from the parent of the child for placement to continue to receive specially designed instruction and related services. Additional consent to serve is not needed, even though the location(s) of the delivery of services may change.

Any changes in the special education program of the child after initial placement are subject to prior notice requirements but not subject to parental consent.

### **Consent for Reevaluation**

Parental consent for reevaluation is required, unless the LEA can demonstrate that it has taken reasonable measures to obtain the consent, and the child's parent has failed to respond. To show reasonable measures taken, the LEA shall keep documentation that may include:

- (a) the records of telephone calls made or attempted and any responses received;
- (b) copies of correspondence sent to the parents and any response received; and
- (c) records of the visits made to the parent's home or place of employment and the results of those visits.

If the parent responds and refuses to consent to the proposed reevaluation, procedures must be followed in accordance with denial of consent in the following paragraph. (see also Chapter III, Section 3.)

### **Denial or Revocation of Parent Consent**

If a parent of a child with a disability refuses consent for an initial evaluation or reevaluation, the LEA may continue to pursue that evaluation by requesting a due process hearing or using the mediation procedures.

If the parent revokes consent, that revocation is not retroactive. The withdrawal of consent does not negate an action that occurred after consent was first given and before it was withdrawn.

If the parents deny or revoke consent, the KLEA representative will contact the DoSE the next school day with a request for consultation regarding the refusal. When KLEA personnel disagree with the parent's action, then mediation or a due process hearing may be requested to obtain consent for the proposed action.

If consent is denied or revoked, the DoSE and the building principal make sure that the child remains in the present educational placement during any due process hearings and appeals, unless the parent and other ARC members agree otherwise.

## **SECTION 5. RIGHT TO MEDIATION AND DUE PROCESS HEARINGS**

Information regarding mediation and due process hearing rights is included in the Parent's Rights document provided by KLEA.

### **Mediation**

The LEA and parent of a child with a disability shall have the right to request mediation from the Kentucky Department of Education to resolve any disputes that may arise under 707 KAR Chapter 1.

### **Due Process Hearing**

A parent of a child with a disability or the LEA may initiate a due process hearing on:

- (a) any of the matters described in the written notice relating to identification, evaluation, or educational placement of a child with a disability; or
- (b) the provision of FAPE to the child; or
- (c) the refusal to initiate or change the identification, evaluation or educational placement of the child.

When a hearing is initiated, the LEA shall inform the parent of the availability of mediation to resolve the dispute.

The LEA shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or if a parent or LEA initiates a hearing.

The KLEA representative shall obtain a listing of such services from the DoSE, who is responsible for providing an up-to-date list.

## **SECTION 6. MEDIATION RIGHTS**

### **Requirements of Mediation**

The mediation process, if chosen, shall:

- (a) be voluntary;
- (b) not be used to deny or delay a parent's right to a due process hearing under Section 5 and Section 7 or 34 CFR Section 300.507, or to deny any other rights afforded under this administrative regulation or IDEA Subpart E; and
- (c) be conducted by a qualified and impartial mediator trained in effective mediation techniques.

The KLEA Representative shall offer mediation to the parent as an option to settle differences concerning the identification, evaluation, or educational placement or the provision of a free appropriate public education. Mediation is not required, but must be explained and offered by the KLEA any time a due process hearing is requested. The KLEA and the parent must jointly submit a written request to KDE for mediation. A document explaining the guidelines for mediation is available from KDE/DECS.

## **SECTION 7. HEARING RIGHTS**

Note that hearing rights for children placed in private schools by their parents are limited to Child Find, evaluation and reevaluation issues. See Chapter X, Private Schools, Section 6, for additional information.

### **Hearing Requests**

A due process hearing may also be initiated by the LEA if LEA personnel disagree with a parent's denial or revocation of consent {see Section 4}, or when LEA personnel and the parent cannot agree on proposed or refused actions to initiate or change the identification, evaluation, or placement of the child or the provision of a free appropriate public education to the child.

When the KLEA decides to request a due process hearing, the DoSE develops a letter requesting a due process hearing and submits it to the Superintendent.

The letter shall contain:

- (a) the name of the child;
- (b) the address of the residence of the child;
- (c) the name of the school the child is attending;

- (d) a description of the nature of the problem; and
- (e) facts relating to the problem and a proposed resolution to the extent known and available to the parents at the time.

The facts contained in the hearing request letter establish that the disagreement that exists between the KLEA and the parent of the child is related to the identification, evaluation, placement, or the provision of a free appropriate public education to a child.

A hearing request may be cancelled by the hearing officer upon receipt of written documentation from the party requesting the hearing. If, after the KLEA requests a due process hearing, KLEA personnel and the parent come to an agreement on the issue(s) presented in the KLEA's hearing request, the DoSE prepares a letter requesting cancellation of the hearing request. If a hearing officer has not yet been assigned, the Superintendent mails the letter to the Division of Exceptional Children Services. If a hearing officer has already been assigned, the Superintendent mails the letter to the assigned hearing officer.

The procedures included in KRS Chapter 13B and IDEA Subpart E shall apply to a due process hearing.

### **Arrangements Prior to the Hearing**

#### **Additional disclosure of information.**

(1) At least 5 business days prior to a hearing conducted pursuant to §300.507(a), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party. §300.509 of IDEA Federal Regulations.

Upon receipt of notification of the assignment of an Impartial Due Process Hearing Officer, within five (5) calendar days, the DoSE contacts the hearing officer via telephone calls to determine available dates for conducting the hearing (usually done on first conference call).

The DoSE schedules the hearing at a time, date and location convenient to the KLEA, the parent of the child, and the hearing officer. What is convenient depends on the schedules of the KLEA Board attorney and KLEA personnel, the schedules of the parents and the parents' representative, and the availability of the hearing officer. Since so many parties are involved in the proceedings and since the hearing is held and the decision rendered within forty-five (45) calendar days of the hearing request, the DoSE begins scheduling the hearing immediately upon notification of the assignment of the hearing officer.

Prior to a due process hearing, the DoSE, in consultation with the KLEA Representative and the Board attorney:

- a. makes arrangements to provide a court reporter for the hearing to make sure a true

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- and accurate record of the hearing is available in a timely manner. (All costs related to transcription, including the cost for the court reporter hired, are paid for by the KLEA.) A written verbatim record is to be provided to the hearing officer and to the parent's representative;
- b. informs the parent of their right, (or if the child is emancipated, the child's right) to open the hearing to the public;
  - c. informs the parent of the right to have the child present at the proceedings;
  - d. provides the parent of the child with a written list of the names, addresses and phone numbers of free or low-cost legal services or other relevant services available in the geographic area;
  - e. notifies the parent and the hearing officer in writing of the KLEA's intent to be represented by legal counsel (if true). The notice includes the counsel's name, address and telephone number;
  - f. if requested, provides the hearing officer and the parent with a written chronology of events leading to the hearing at least fourteen (14) days prior to the hearing.
  - g. The chronology includes the following:
    1. date of an action;
    2. narrative explanation of the action that occurred, including persons, places and activities involved; and
    3. the relevant and specific actions leading to the due process hearing request (not a history of the involvement of the child with the KLEA);
  - h. informs witnesses of the time, date, and location of the hearing;
  - i. discloses all pertinent information concerning the hearing to the parents and to the impartial hearing officer at least five (5) business days prior to the hearing, including:
    1. the name and title of all witnesses;
    2. the general nature of the expected testimony; and
    3. all documents and records which may be entered as evidence at the hearing.

All information not disclosed in a timely manner prior to the hearing may become inadmissible unless both the parent and the LEA agree otherwise.

Working in cooperation with the DoSE, the KLEA Representative and the Superintendent, the KLEA Board attorney files with the hearing officer all written motions, briefs, and other documents and at the same time, provides a copy to the other parties to the proceedings. Copies of any documentation sent to the hearing officer are maintained in the office of the DoSE.

### Attorneys' fees

In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party. Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the Act and subpart E of this part.

A court awards reasonable attorney's fees under section 615(i)(3) of the Act consistent with the

following:

(1) Determination of amount of attorneys' fees. Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(2) Prohibition of attorneys' fees and related costs for certain services.

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if-

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in §300.506 that is conducted prior to the filing of a request for due process under §§300.507 or 300.520-300.528.

Exception to prohibition on attorneys' fees and related costs.

Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

Reduction of amount of attorneys' fees. Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that-

(i) The parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with §300.507(c).

Exception to reduction in amount of attorneys' fees. The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act. (§300.513 of the IDEA Federal Regulations)

After consultation with the KLEA Representative, the Board attorney and the Superintendent, and if directed by the Superintendent, the DoSE makes a written offer of settlement to the parents at least ten (10) calendar days prior to the hearing. A copy of the settlement offer is not sent to the hearing officer. One purpose of this settlement offer is a possible reduction in the parent's attorney fees, if the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

## **SECTION 8. APPEAL OF DECISION**

If the KLEA requests a due process hearing, and is unsuccessful in the due process hearing, the DoSE, KLEA Representative, Superintendent, and the KLEA Board attorney meet to discuss whether or not to appeal the decision of the Due Process Hearing Officer

to the Exceptional Children Appeals Board. If the DoSE, KLEA Representative, Superintendent, and the KLEA Board attorney determine the KLEA's proposed action is in the best interest of the child, then the DoSE prepares the appeal to be submitted by the Superintendent within fifteen calendar days from the date the order/decision was mailed. Upon receipt of the written appeal, a written copy of the entire hearing record is provided to the assigned Exceptional Children Appeals Board (ECAB).

The ECAB insures that no later than thirty (30) days after the receipt of a written request for a review of the hearing officer's findings of fact and decision in a due process hearing:

- a. a final decision is reached in the review; and
- b. a copy of the decision is mailed to each of the parties.
- c. (the DoSE is responsible for monitoring the implementation of the hearing officer's decision, and reporting to the Superintendent regarding implementation status.

### **Child Status During Pendency of Judicial Proceedings**

(a) Except as provided in §300.526 {disciplinary provisions}, during the pendency of any administrative or judicial proceeding regarding a complaint under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the decision of a hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section. (§300.514 of the IDEA Federal Regulations)

The DoSE and building principal make sure that during the pendency of any proceedings (i.e., due process hearings, appeals to the Exceptional Children Appeals Board) or judicial proceedings (i.e., any civil action brought under IDEA), the child remains in his present educational placement unless the ARC and the parent agree otherwise. If the hearing or judicial proceedings involve an application for initial admission to public school, the child, with the consent of the parent, is placed in the LEA in an age appropriate program until the completion of all the proceedings.

### **SECTION 9 REPRESENTATION OF CHILDREN**

The LEA shall ensure the rights of a child are protected by determining an educational representative for the child.

The KLEA Representative makes sure that each child is represented by an educational representative at all decision-making points in the process of identification, evaluation, placement and provision of a free appropriate public education.



The KLEA Representative verifies the location, legal status and availability of parents or guardians prior to taking any action with regard to the identification, evaluation or educational placement of a child, or the provision of a free appropriate public education.

"Parent" means a natural or adoptive parent of a child; or

- \* a guardian but not the state if the child is a ward of the state; or
- \* a person acting in the place of a parent( e.g. a grandparent or stepparent with whom the child lives) or a person who is legally responsible for the child's welfare; or
- \* a surrogate parent appointed in accordance with this section; or
- \* a foster parent if the natural parents' authority to make educational decisions on the child's behalf has been extinguished and the foster parent has an on-going, long-term parental relationship with the child, is willing to make the education decisions required of parents under these regulations, and has no interest that would conflict with the interests of the child. (Chapter I, Definitions)

### **Determination of Representation**

No later than at the time of referral, the KLEA Representative, through a review of the records of the child, determines if a child is:

- a. emancipated ( age 18 or married), and therefore represents himself in educational decision-making; or
- b. to be represented by an adult, such as a parent, a guardian, a person acting as a parent, a surrogate parent, or a long-term foster parent.

### **Natural or Adoptive Parents**

Either parent, natural or adoptive, has parental rights unless there has been a judicial determination that limits or terminates their rights. Parents are considered available when a current residence or mailing address is identified by the KLEA Representative.

If no parent is in residence, the LEA Representative obtains the name and address of either natural parent, and any documents impacting the parent's legal status regarding educational decision-making. This includes whether or not the current custodial arrangement is informal, between the parent or custodian, or is a result of a State agency or court action.

### **Legal Guardian**

If the KLEA Representative determines the child is represented by a legal guardian, the KLEA Representative obtains a copy of the court order from the guardian establishing the legal guardianship. The KLEA Representative places a copy of the court order in the educational record of the child.

If there is no parent available, and the person caring for the child is doing so as the result of State agency or court action rather than through an informal arrangement that was voluntarily agreed to by the parent, the KLEA Representative requires this person to provide information regarding the legal status of the rights of the parent with respect to



the child. This person does not qualify as the educational representative unless the person is a private individual who can produce a court order that he or she has been granted guardianship for educational purposes. Unless the person can produce a court order that he or she is a private (as opposed to state-appointed) guardian, such a person may not represent the child and, absent written parental permission, is not allowed access to the educational records of the child.

### **Person Acting As a Parent**

If the KLEA Representative determines there is no parent available and the person with whom the child resides is a family member, friend, or other person with whom the parent has made an informal arrangement to care for the child without state agency or court intervention, the KLEA representative determines this is a person "acting as a parent" and as such has all the rights of a parent until the parent reappears to reclaim his or her rights. For example, a grandparent, neighbor, governess, friend, or private individual caring for the child with the explicit or tacit approval of the parent or guardian of the child would qualify as a "person acting as a parent".

### **Commitment to CFC or DJJ - Parental Rights Not Terminated**

If the child has been committed to the Cabinet for Families and Children or the Department of Juvenile Justice and parental rights have not been terminated, then the KLEA Representative involves the natural parent in education decision-making and no surrogate parent is assigned.

### **Commitment to CFC or DJJ - Parental Rights Terminated**

"Ward of the state" means a child who has been committed to the Cabinet for Families and Children (CFC) or the Department of Juvenile Justice (DJJ) through a legal process and the natural parental rights have been terminated. This commitment may be voluntary or involuntary. (Chapter I Definitions)

If the KLEA Representative determines that the child is a ward of the State (i.e., parental rights have been terminated by the court), the KLEA Representative immediately contacts the DoSE and obtains a copy of the court order verifying that the child is a ward of the State. The KLEA Representative enters the copy of the court order into the educational record of the child. The DoSE will appoint a surrogate parent in accordance with procedures described in the following paragraphs. In accordance with regulations regarding the appointment of surrogate parents, the KLEA will not appoint any employee of a public agency involved in the care or education of the child as a surrogate. This includes social workers, court designated workers, etc.)

On rare occasions, and in instances that involve protection of the child, CFC may state that parents must not learn information regarding the whereabouts of their child. In such cases, CFC should present to the district a court order that prohibits parent involvement with the child. A copy of such order will be obtained by the district and placed in the

child's records, and the DoSE will appoint a surrogate because the child's parents are unavailable.

### **Foster Parent**

The KLEA Representative verifies that the child resides in a foster home or is otherwise in custody of a State agency.

#### Short Term Placement

If the child is placed with foster parents, the KLEA Representative determines whether or not parental rights have been terminated, and the procedures above are followed. If no parent is known, their whereabouts cannot be determined, or parental rights have been terminated, the foster parent may be assigned as a surrogate parent by the DoSE in accordance with procedures.

#### Long Term Placement

In the event parent's rights have been terminated, the foster parent may act as parent without the need for appointment as surrogate parent under the following conditions:

- a. the foster parent has an on-going, long-term parental relationship with the child;
- b. the foster parent is willing to make the educational decisions required of parents under special education regulations; and
- c. the foster parent has no interest that would conflict with the interests of the child.  
(Chapter I, Definitions, "Conflict of Interest")

### **Emancipation**

When a child with a disability reaches the age of majority (age eighteen), all rights under 707 KAR Chapter 1 shall transfer from the parents to the child, unless the child has been declared incompetent in a court of law.

Unless the parent so notifies the school, KLEA personnel assume the youth at age eighteen is considered to be able to make informed decisions.

The LEA shall notify the child with a disability and the parents of the transfer of rights at age eighteen.

A married youth of any age is also considered emancipated.

### **Need to Report Other Living Arrangements**

If none of the above conditions is verified, the KLEA Representative notifies the DPP.

### **Surrogate Parent Appointment**

The LEA protects the rights of a child by assigning a surrogate parent to make educational decisions for the child if:

- (a) no parent as defined above can be identified;
- (b) the LEA, after reasonable efforts, cannot discover the whereabouts of the parent; or
- (c) the child is a ward of the State (i.e., parental rights terminated by court order).

A surrogate parent is not considered an employee of the LEA solely because he is paid by the LEA to serve as a surrogate parent. A surrogate parent is not considered an employee of the CFC solely because he is paid by that agency to serve as a foster parent to the child. Payment of a foster parent by CFC for providing care to a child does not make him or her an employee of the CFC for the purpose of determining eligibility status as a surrogate parent. The mere fact that a person receives payment for being a foster parent does not disqualify him or her under the non-employee requirement from being appointed as a surrogate.

A surrogate parent may be an employee of a private agency that provides non-educational care for the child if the person meets other criteria in this section.

The ARC recognizes the surrogate parent as the one to represent the child exercise all of the educational rights, responsibilities, and authorities as a parent of the child, such as the rights to:

- (a) receive notice of proposed or refused actions;
- (b) provide or deny consent;
- (c) participate in ARC meetings, development, review and revision of IEPs, and in development of placement recommendations;
- (d) protections under confidentiality;
- (e) request an independent educational evaluation of the child; and
- (f) request an impartial due process hearing and appeal.

An individual serves as a surrogate subject to reappearance of natural parents, marriage of the youth, the youth reaches the age of majority, or because the surrogate no longer meets the qualifications and criteria for assignment described in this section.

### **Selection of Surrogate Parent Volunteers**

The LEA shall have a system for selecting surrogates.

The LEA selects persons as surrogate parents who:

- (a) have no conflicting vested interest;
- (b) shall have knowledge and skills that ensure adequate representation of the child;
- (c) are not an employee of the LEA, the Kentucky Department of Education, or any other public agency involved in the education or care of the child.

A conflict of interest exists when it appears that the person being considered:

- a. might benefit personally or professionally from decisions regarding the child; or
- b. might be recruited to make decisions which might affect policy in which the person has a personal or professional interest.

### **SECTION 10. DISCIPLINE PROCEDURES**

The Superintendent, DoSE and building principals make sure that appropriate procedures are followed in the discipline, suspension and expulsion of children with disabilities.

## **Student Behavior**

The ARC shall, in the case of a child whose behavior impedes his or her learning, or that of others, consider, if appropriate, strategies, including positive interventions strategies and supports, to address that behavior. (Chapter V, IEP)

Expectations for student behavior and consequences for misbehavior/policy violations are the same for all children, and are detailed in the KLEA Student Handbook. Consequences that are applied for all children may be utilized for the child with a disability, as long as the consequence does not conflict with the provisions of the IEP or a Behavior Intervention Plan. The child must continue to receive the services in the IEP, have the opportunity to progress in the general education curriculum, and participate with nondisabled children to the same extent as before. The ARC may modify or adapt the consequences utilized with all children to meet the needs of a child with a disability as documented in the IEP or a Behavior Intervention Plan.

Special education includes the instruction of appropriate behavior. When the ARC determines that behavioral interventions that are implemented with non-disabled students would be unsuccessful, the committee should designate appropriate strategies and positive behavioral interventions and supports in the IEP for that student.

In-school alternative education programs may be used as a short-time disciplinary method with students with disabilities so long as the child's IEP continues to be implemented. This type of in-school suspension does not count in terms of the 10 consecutive days limit or as a pattern of removals as long as the child continues to receive the services in the IEP, has the opportunity to progress in the general education curriculum, and continues to participate with nondisabled children to the same extent as before. (Comments, Federal Regulations, p.12619)

Suspensions from the school bus may be utilized under procedures developed by the KLEA for all children. Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If bus transportation is a related service and included in the IEP, a bus suspension would be considered as a suspension unless the KLEA provides the transportation in some other way, because that transportation is necessary for the child to obtain access to the location where all other services are delivered. If bus transportation is not a part of the IEP, the bus suspension is not counted as a suspension in terms of the 10 consecutive day limit or as a pattern of removal. In those cases, the child (and the parents) would have the same obligation to get to and from school as a nondisabled child who had been suspended from the bus. Attention should be given to whether behavior on the bus is similar to behavior in a classroom and whether bus behavior should be addressed in the IEP or behavioral intervention plan for the child. (Comments, Federal Regulations, p. 12619)

### **Suspension for 10 days or less in a school year**

## **Chapter VII Procedural Safeguards**

The due process procedures for short-term suspension are the same for all students and are outlined in the District Student Handbook. When suspensions are ten (10) days or less in length, do not exceed ten (10) days cumulative in a school year, and are utilized as temporary disciplinary measures (if the suspension is for a minor infraction and no further disciplinary action is planned), then an ARC meeting is not required unless requested by the parent or principal or other service providers.

A public agency need not provide services during periods of removal for disciplinary reasons to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not provided to a child without disabilities who has been similarly removed

### **Suspensions for More than 10 days Cumulative per School Year that do not Constitute a Change of Placement for Disciplinary Reasons**

Educational services shall not be terminated during a period of expulsion and during a suspension after a student is suspended for more than a total of ten (10) days per school year. KRS158.150 (6)(c)

In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the LEA, for the remainder of the removals, must provide services to the extent necessary to:

- (1) enable the child to appropriately progress in the general curriculum, and
- (2) appropriately advance toward achieving the goals set out in the child's IEP. (Section 300.121(d) as authorized by KRS 158.150)

School personnel, in consultation with the child's special education teacher, determine the extent to which services are necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in the child's IEP (if the child is removed under the authority of school personnel to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement under §300.519.) (§300.520(a)(1)).

Beginning on the eleventh (11<sup>th</sup>) day of suspension, services must be provided. The KLEA Representative and the DoSE, shall consult with the child's special education teacher(s), and determine the services that will meet the criteria as stated above. On the eleventh (11<sup>th</sup>) day of removal, the KLEA Representative will send a written notice of an ARC meeting to address the requirements for a Functional Behavioral Assessment (FBA) and a Behavior Intervention Plan (BIP).

The requirements for a functional behavior assessment and behavior intervention plan apply as stated in that section which follows below.

### **Change of Educational Placement for Disciplinary Reasons**

A change of placement for disciplinary reasons occurs when  
(a) the removal is for more than 10 consecutive school days; or  
(b) the child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity of the removals to one another. (KRS 158.150 (1) (6) (a) }

Whether the removals constitute a pattern of removals, and thus a change in placement, is determined on a case-by-case basis by the KLEA Representative, DoSE and the teacher. The decision is subject to review through due process and judicial proceedings.

### **Functional Behavior Assessment and Behavior Intervention Plan**

No later than ten (10) business days after either first removing the child for more than 10 school days in a school year or commencing an action that results in a change of placement for disciplinary reasons, the LEA shall convene an ARC to:  
(a) develop a plan for conducting a functional behavior assessment, if an assessment has not been conducted;  
(b) develop and implement a behavioral intervention plan if a functional behavioral assessment has already been conducted; or  
(c) review and modify the assessment and the plan, as necessary, to address the behavior if a functional behavioral assessment has been conducted and a behavioral intervention plan has been developed. {authorized by KRS 158.150 (6)(c) }

As soon as practicable after developing the functional behavioral assessment described above, and completing the assessments required by the plan, the LEA shall convene an ARC to develop appropriate behavioral interventions to address the behavior and shall implement those interventions.

If subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than 10 school days in a school year is subjected to a removal that does not constitute a disciplinary change of placement, the IEP team members shall review the behavioral intervention plan and its implementation to determine if modifications are necessary. § 300.520(c)(1)

If one of more of the ARC members believe that modifications are needed, the ARC shall meet to modify the plan and its implementation, to the extent that the ARC determines necessary.

### **Change of Placement for Violations Involving Weapons or Drugs**

A child's ARC may order a change in placement of a child with a disability to an appropriate interim educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than forty-five (45) days, if:  
(a) the child carries or possesses a weapon to or at: school; a school function; or school premises; or  
(b) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function. An illegal drug shall not include a substance that

is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under the authority of any other provision of the Controlled Substances Act, 21 U.S.C. Section 812 (c) or under any other provision of federal law.

A weapon is defined as a device, instrument, material or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length. (Chapter I, Definitions)

Possession or use of an illegal drug, or the sale or solicitation for sale of a controlled substance does not include violation of the KLEA's policy on look-a-like drugs. This disciplinary change in placement cannot be ordered if the violation includes only a look-a-like substance. In addition alcohol, tobacco, and other substances that may be controlled by state law, are not on this listing found in the Federal Controlled Substance Act (see legal reference in box above), and thus cannot be used as the basis for evoking the forty-five (45) calendar day unilateral removal.

In the event of determination of violation under this section, the KLEA Representative shall inform the parents and immediately schedule an ARC meeting. A manifestation determination will be conducted (see Section 11). However, a disciplinary change in placement may occur for up to 45 calendar days even if the behavior is determined to be a manifestation of the disability. If the behavior is determined to not be a manifestation of the disability, then the child may be disciplined as a nondisabled child would be disciplined, with the requirement that services in accordance with the IEP must be continued.

The procedures for a functional behavior assessment and a behavior intervention plan will be followed (see previous information in this Section). The ARC may order a change in placement for disciplinary reasons to an interim alternative educational setting for not more than 45 calendar days, if the parent is not in agreement with the proposed placement change.

### **Interim Alternative Educational Setting**

An interim alternative educational setting in which a child is placed shall:

- (a) enable the child to continue to progress in the general curriculum;
- (b) enable the child to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in the IEP; and
- (c) include services and modifications to address the behavior to prevent the behavior from recurring.

The term "interim alternative education setting" (IAES) refers to any placement setting that is identified as a unilateral disciplinary response to weapons or drug violations, or any setting approved by a hearing officer or judge when a situation of substantial injury is at issue. In all cases, the IAES must meet the three (3) criteria as defined above. The ARC has the responsibility of determining the appropriate IAES for the child.



**Change of Placement When Maintaining the Current Placement Is Substantially Likely to Result in Injury to the Child or Others**

A due process hearing officer may order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five (45) days if the hearing officer, in an expedited due process hearing:

- (a) determines that the LEA has demonstrated by substantial evidence (i.e., beyond a preponderance of the evidence) that maintaining the current placement of the child is substantially likely to result in injury to the child or to others;
- (b) considers the appropriateness of the child's current placement;
- (c) considers whether the LEA has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
- (d) determines the interim alternative educational setting that is proposed by the school personnel who have consulted with the child's special education teacher, meets the requirements contained in 707 KAR 1:340, Section 10 (7).

In instances of extremely serious misconduct in which it appears that maintaining a student in his/her current educational placement is substantially likely to result in serious injury to self or others, the school district may choose to:

- a. request an expedited due process hearing, or
- b. pursue through the judicial system a temporary removal of the student from school.

Such action is initiated only when the parents refuse a change of placement for disciplinary reasons. A manifestation determination will be conducted (see Section 11). However, a disciplinary change in placement may occur, as ordered by a judge or Hearing Officer, even if the behavior is determined to be a manifestation of the disability. The procedures for a functional behavior assessment and a behavior intervention plan will be followed (see previous information in this Section).

The Superintendent and the DoSE review all documentation, and make the determination to either direct the Board attorney to seek injunction relief through the court or file an expedited due process hearing request. The same process will be followed for this expedited hearing request as are followed for other due process hearing requests, except that the information prepared will specifically address the considerations listed above for an expedited hearing and determination of placement in an interim alternative education setting.

**SECTION 11. MANIFESTATION DETERMINATION REVIEW**

A manifestation determination is necessary:

- a. to determine whether the placement for a child with a disability can be changed for disciplinary reasons over the objection of the child's parents to a long-term suspension or expulsion;
- b. when the school is going to make a unilateral change in placement for reason of weapons or drug violation; or
- c. when the school is seeking approval for such a change from a judge or hearing



officer due to likelihood of injury to self or others.

However, there is no basis for differentiating the services that must be provided to children with disabilities because their behavior is, or is not, a manifestation of their disability. Services, as defined in the IEP, will continue in any new placement.

If an action is contemplated that will result in a change of placement for a child with a disability who has engaged in behavior that violated any rule or code of conduct of the LEA that applies to all children:

- (a) not later than the date on which the decision to take action is made, the parents shall be notified of the decision and provided with a copy of procedural safeguards; and
- (b) immediately, if possible, but in no case later than ten (10) school days after the date on which the decision to take that action is made, a review by the ARC and other qualified personnel shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

When the ARC convenes to consider a change of placement for disciplinary reasons, the KLEA Representative invites the DoSE to attend the meeting. The normal timeline for a notice of ARC meeting does not apply in this circumstance; parents are notified on the date the decision is made to pursue a disciplinary change of placement, and the meeting may be held immediately.

In conducting the review, the ARC may determine that the behavior of the child was not a manifestation of the child's disability if:

- (a) the ARC first considers, in terms of the behavior subject to the disciplinary action, all relevant information including evaluation and diagnostic results, relevant information supplied by the parents, observation of the child and the child's IEP and placement;
- (b) after the review of this information, the child's IEP and placement are reviewed in relationship to the behavior subject to the disciplinary action to determine if the IEP and placement were appropriate and the specially designed instruction and related services, supplementary aids and services and the behavior intervention strategies were provided consistent with the child's IEP and placement; and
- (c) the ARC determines:
  - (1) if the child's disability impaired the ability of the child to understand the impact and consequences of the behavior, and
  - (2) if the child's disability impaired the ability of the child to control the behavior.

The ARC:

- a. considers all relevant information, including any evaluation information that describes the specific behavior(s);
- b. recommends interventions;
- c. discusses steps taken by the school to address the problem behavior;
- d. reviews the IEP and placement in relation to the behavior in question to determine if both were appropriate, and implemented as designed. (If the ARC finds that the IEP and placement are appropriate and being fully and correctly implemented, they must then consider whether the behavior or misconduct was a manifestation of the disability.) and;
- e. discusses the ability of the child to understand the impact and consequences of the behavior, and whether the child's disability impaired his ability to control his/her

behavior.

If the ARC determines that any of the standards as stated above were not met, the behavior shall be considered a manifestation of the child's disability.

If the behavior is found to be a manifestation of the child's disability, and that behavior did not involve violations of weapons or drugs policies as defined in Section 10 or likelihood of injury to self or others (see Section 10), the child is returned to the current placement.

If the ARC identifies any deficiencies in the child's IEP or placement or in its implementation, the LEA shall take immediate steps to remedy those deficiencies.

In addition, if the behavior has not been previously addressed in the IEP, the ARC should include the development of strategies, including positive behavioral interventions, strategies and supports to address that behavior.

The recorder documents the rationale and the decision of the ARC on the conference summary including:

- a. the decision of the ARC;
- b. a description of any evaluation procedure, test, record, or report the ARC used in its determination; and
- c. a description of any other factors that are relevant to the ARC's determination.

If after the manifestation determination review, the ARC determines the behavior was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to all children may be applied to the child in the same manner in which they would be applied to children without disabilities.

When the behavior is not a manifestation, the disciplinary removal from a regular placement may be for as long as the removal would be as applied to a child with no disability, and need not be limited to a 45 calendar day interim alternative educational placement. Appropriate services as specified in the IEP to ensure FAPE must be provided to the child. (See Chapter I, Definitions and Chapter II, FAPE)

If the LEA initiates disciplinary procedures applicable to all children, it shall ensure that all special education and disciplinary records are transmitted to the school personnel making the final determination regarding the disciplinary actions as to the child with disabilities.

Within **two (2)** business days of the ARC's determination that the behavior is not related to the disability of the child, the KLEA Representative informs the Superintendent of the ARC's decision. If this determination is made, and removal (expulsion, alternative school placement, etc.) is the disciplinary action for a nondisabled child in similar circumstances, the Superintendent may recommend removal to the Board according to KLEA's regular policies and procedures for removal.

The KLEA Representative is responsible for following KLEA procedures regarding the copying of special education and disciplinary records and delivering those copies to the appropriate persons making the decision; for example the Alternative School Screening Committee; the Board of Education; etc. All special education and disciplinary records are to be made available, including the current IEP and all current progress monitoring summaries, and the Conference Summary records of the ARC meeting where the manifestation determination was made.

Educational services for the child are not terminated during any period of expulsion or long- term removal (more than ten days within one school year). If the KLEA expels a child who is receiving specially designed instruction and related services, then within **three (3) school days** of the Board action, the DoSE sends notice of an ARC meeting. The ARC meets to review and revise the IEP, according to policies and procedures in Chapter V, Individualized Education Program, for implementation in the new setting. The DoSE selects appropriate KLEA teachers and related service personnel to provide specially designed instruction and related services in that setting.

A parent may request a due process hearing to contest the decision reached in a manifestation determination review or with any decision regarding placement under this section. The hearing shall be arranged in an expedited manner.

If the parent disagrees with the determination of the ARC that the behavior is not related to the disability, the parent may request an expedited due process hearing according to procedures in Sections 5 & 7 of this chapter. A parent's right to an expedited hearing is limited to placements relative to the disciplinary situations involving a change of placement, and not to other placement or disciplinary issues. (Comments to the federal regulations, p. 12627)

The KLEA Student Handbook includes a reference to the policies and procedures for discipline, suspension and expulsion of children with disabilities. This handbook is given to all students at the beginning of the school year.

## **SECTION 12. CHALLENGES TO PLACEMENT IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING AND MANIFESTATION DETERMINATIONS**

If a parent requests a hearing to challenge:

- (1) the placement of his child in an interim alternative educational setting or
- (2) the manifestation determination,

the child shall remain in the interim alternative educational setting until the decision is final or until the expiration of the time period for the placement, whichever occurs first, unless the parent and the LEA agree otherwise.

If a child is placed in an interim alternative educational setting and school personnel propose to change the child's placement after expiration of the time period, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (i.e., the child's placement prior to the interim alternative educational setting) unless the school personnel maintain that it is dangerous for the child to be in the current placement, in which case the LEA may request an expedited due process hearing.

"The standards for an expedited due process hearing require that a written decision be mailed to the parties in less than 45 days, with no extensions of time that result in a decision more than 45 days from the date of the request for a hearing, and it must be the same period of time, whether the hearing is requested by the KLEA or the parent." (Comments of Federal Regulations, p. 12630) The KLEA may also seek judicial relief in these circumstances. (See Section 10 of this Chapter)

### **SECTION 13. BASIS OF KNOWLEDGE REGARDING CHILDREN NOT YET ELIGIBLE UNDER IDEA-97**

A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a rule or code of conduct of the LEA, may assert any of the protections provided for in this administrative regulation if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

A district shall be deemed to have knowledge that a child is a child with a disability if:

- (1) the parent of the child has expressed concern in writing (or orally if the parent cannot express it in writing) to personnel of the district that the child is in need of special education and related services;
- (2) the behavior or performance of the child demonstrates the need for these services;
- (3) the parent of the child has requested an evaluation pursuant to the requirements in 707 KAR 1:300; or
- (4) the teacher of the child, or other personnel of the district, has expressed concern about the behavior or performance of the child to the DoSE or to other personnel in accordance with the districts' child find or special education referral system.

Although teachers and other school personnel may express concerns about the behavior or performance of children in their classrooms, such expression of concern does not create knowledge on the part of the school district unless the concerns are expressed in accordance with the school's Child Find or special education referral system. Schools also are not deemed to have knowledge of a disability merely because a child received services under other programs designed to provide compensatory or remedial services or because the child had limited English proficiency.

A district shall not be deemed to have knowledge that a child may be a child with a disability if, as a result of receiving information, the district conducted an evaluation and determined the child was not a child with a disability or determined an evaluation was not necessary and provided notice to the parent s of these determinations

If the school does not have knowledge that a child is a child with a disability prior to taking disciplinary action against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities, including suspension or expulsion.

When a student disciplinary offense occurs that warrants consideration for possible expulsion, the building principal may request that a review of the student's complete

educational records be conducted by the DoSE or a school psychologist, in accordance with district general education procedures. This student record review is documented on a form provided by the district, and is intended to provide a current summary of the child's educational history to assure that the district has no reason to suspect the presence of a disability. If the record reviewer does suspect the presence of a disability, the appropriate referral will be made immediately. If there is no reason to suspect the presence of a disability, disciplinary action will follow according to general education procedures.

If the child's parents request evaluation of the child during the period of suspension or expulsion or other disciplinary action, the evaluation must be conducted in an expedited manner.

"No specific timeline for an expedited evaluation is included in regulations, as what may be required to conduct an evaluation will vary widely depending upon the nature and extent of a child's suspected disability and the amount of additional information that would be necessary to make an eligibility determination. However, the evaluation should be conducted in a shorter time period than a normal evaluation."(p. 12629 in the Comments following Federal Regulations). Thus, in accordance with KLEA timelines, an expedited evaluation will be completed in less than 45 school days.

Pending the results of the evaluation, the student remains in the setting determined by school authorities (that may be the out-of-school suspension or expulsion without educational services, unless educational services are provided to students without disabilities under similar circumstances).

The school is not required to put disciplinary proceedings on hold until the evaluation is completed. If the child is determined to be a child with a disability, based on the evaluation and review of information supplied by the parents, the school must then provide special education and related services.

## **SECTION 14. REPORTING TO LAW ENFORCEMENT AGENCIES**

### **Reporting a Crime**

Notwithstanding any provisions of special education statute and regulations, the LEA may report a crime committed by a child with a disability to appropriate authorities.

The KLEA Representative is the responsible party for reporting a crime to appropriate authorities in the same manner as for children without disabilities. Within one school day, the DoSE will be notified. Reporting a crime is to be distinguished from the filing of charges against the child.

The definition of crime is the same as applied to children without disabilities.

### **Transmission of Records**

If the LEA reports a crime committed by a child with a disability, it shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to the extent the transmission is permitted by the Family Education Rights and Privacy Act, 20 U.S.C. Section 1232g.

When records are provided to law enforcement or judicial authorities, the disclosure must be on the condition that the record will not be further disclosed without the written consent of the student's parents, or the student if the student is 18 or older.

When reporting a crime, the KLEA Representative will contact the parents of the child **in accordance with district procedures**. The KLEA Representative will explain the circumstances of the report, and that it is in the child's best interest for special education information to be released to the appropriate authorities. The parent will be asked to sign a release of records form.

This regulation makes it clear the school can transmit records to appropriate law enforcement and judicial authorities only if FERPA will allow the disclosure.

In accordance with the Family Educational Rights and Privacy Act (FERPA) and KRS 160. 720, in most circumstances the district must obtain parent consent to transmit a child's special education records to the authorities.

FERPA and state law always allows disclosure if parents consent to the disclosure. If the parent refuses to sign for release of the above records, the KLEA Representative will immediately contact the DoSE. Records will be released only if the KLEA Representative, the DoSE, and the Superintendent agree that this release of records falls under a FERPA exemption as stated below.

Exceptions under FERPA to the parent consent requirement allow for disclosure in other specific circumstances:

- a. Student records may be disclosed in compliance with a lawfully issued subpoena. However, parents must be notified in writing that the records have been subpoenaed before they are forwarded.
- b. Student records may be disclosed in emergency situations where the disclosure is necessary to protect the health or safety of the student or others.
- c. The definition of educational records in FERPA (Section 99.3) does not include records of the law enforcement unit of an educational agency, subject to provisions in Section 99.8. Thus files created and maintained by a School Resource officer for law enforcement purposes may not be governed by FERPA, and may, under some circumstances be released without parent consent. **(Refer to KLEA Board procedures for guidance on this issue.)**

Unless the authority to release the record under FERPA is clear (parent consent or application of a specific exception), the KLEA shall not release student records (see also Chapter IX, Confidentiality, Section 7).

## **SECTION 15. STATE COMPLAINT PROCEDURES**

The right to file a complaint with the Kentucky Department of Education and the procedures for filing, including the information required and timelines for resolution, are included in the Parent's Rights document and the Kentucky Department of Education Special Education Procedures Manual.

### **Right to File a Complaint**

Parents, individuals and organizations, including someone from outside the state, shall have the right to submit a signed, written complaint to the Kentucky Department of Education alleging violations of state and federal requirements of IDEA.

### **Procedures for Addressing the Complaint**

The following procedures shall apply to the Kentucky Department of Education as to written complaints submitted pursuant to 34 CFR 300.660 through 300.662:

- (a) a time limit of sixty (60) calendar days after the complaint is filed to carry out an independent investigation, if necessary \* ;
- (b) an opportunity by the complainant and the LEA to submit additional information about any allegation in the complaint;
- (c) a review of all relevant information; and
- (d) a written decision addressing each allegation in the complaint containing the findings of fact and conclusions and the reasons for the final decision.

\* The Kentucky Department of Education shall allow an extension of the time limit only if exceptional circumstances exist.

The local district may investigate a complaint and submit the investigation and results to the Kentucky Department of Education. KDE must review the findings to determine their sufficiency.

The DoSE shall receive from KDE staff written notice of any filed complaint. The DoSE shall immediately inform the Superintendent and the KLEA Representative, who must decide if the district will conduct its own investigation or will make all relevant documents, including the due process folder, available to the DoSE within **two (2) business days**. After review of all information and consultation with appropriate staff, the DoSE shall prepare all additional and clarifying information and submit to KDE/DECS staff.

### **Right To Appeal Written Decision from KDE/DECS**

The complainant, parent or the LEA shall have a right to appeal the written decision from a complaint to the Commissioner of the Kentucky Department of Education. The appeal shall be filed within fifteen (15) business days of the receipt of the decision.

**Implementation of Final Decision**

The KDE shall ensure the final decision from a complaint shall be effectively implemented. To achieve compliance, KDE/DECS may apply:

- (a) technical assistance activities;
- (b) negotiations; or
- (c) corrective actions.



## **PROCEDURAL SAFEGUARDS RESOURCES**

### **OSEP and IDEA Partnership Approved Materials:**

#### **Relevant KY Statutes and Regulations:**

KRS Chapter 13B, KY Administrative Procedures Act  
KRS 158.150, Suspension or Expulsion of Students  
KRS 160.700 - 160.730, KY Family Education Rights and Privacy Act

#### **Materials Developed by KDE:**

Mediation Manual

#### **Pertinent Case Law:**

7th Circuit: District's 'gratuitous' payment for IEE does not render parents prevailing parties. Edie F. v. River Falls Sch. Dist., 34 IDELR ¶ 61 (7th Cir. 3/8/01). Stating it wanted to avoid discouraging districts from being "cooperative, creative and responsive," the 7th U.S. Circuit Court of Appeals rejected a claim for attorney's fees after the district settled a dispute with parents by gratuitously providing an additional IEE. According to the court, such an award "adds insult to injury" in circumstances where a district provides services that are not required by law.

With regard to procedural violations, a trend in interpretation is noted as several courts caution against exalting "form" over "substance", e.g. Thomas v Cincinnati Bd of Ed, 17 EHLR 113 (6th Cir.1990); Doe v. Defendant I, 16 EHLR 930 (6<sup>th</sup> Cir., 1990); Independent School District No. 283 v S.D., 24 IDELR 375 (8<sup>th</sup> Cir, 1996). The trend is to examine the following: "Did the procedural inadequacies compromise the student's right to FAPE; compromise the parent's opportunity to participate in the special education process, OR cause a deprivation of educational benefit?"  
Doe v. Withers: (20 IDELR 422, W. VA.)

A teacher was ordered to pay to parents \$5,000 compensatory damages, \$10,000 in punitive damages, and legal fees because of his refusal to implement instructional strategies and modifications required in the IEP.